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**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of: )  
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CC Docket No. 97-213

Communications Assistance for Law  
Enforcement Act )  
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**COMMENTS REGARDING FURTHER NOTICE OF PROPOSED RULEMAKING**

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## SUMMARY

The Commission's Further Notice of Proposed Rulemaking represents a significant step forward in the process of implementing the Communications Assistance for Law Enforcement Act. The Department of Justice and the Federal Bureau of Investigation thank the Commission for its exhaustive efforts to resolve the legal and technical issues concerning CALEA's assistance capability requirements that have been presented in this proceeding. With the Commission's further assistance in the remainder of this proceeding, we are confident that the goals that Congress set out to achieve when it enacted CALEA can be successfully realized.

The Commission has tentatively identified a number of deficiencies in the J-Standard, the industry "safe harbor" standard that is the subject of this proceeding. The Notice seeks comments on the Commission's tentative conclusions regarding the specific provisions of the J-Standard. The Notice also seeks comments on general issues relating to the assistance capability requirements of Section 103 of CALEA and the Commission's discharge of its responsibilities under Section 107(b).

With respect to the general issues identified in the Notice, we encourage the Commission to keep the following points in mind. First, once the Commission has determined that the J-Standard is deficient, the question under Section 107(b) is how to correct the deficiencies, not whether to correct them. If a particular deficiency may be corrected in more than one way, the Commission is free to select the particular means that best furthers the statutory criteria of Section 107(b). But Section 107(b) does not provide a mechanism for industry to be excused from meeting the assistance capability requirements of Section 103. If individual carriers find compliance with Section 103 infeasible, CALEA provides relief through the "reasonable achievability" mechanism of Section

109(b), which -- unlike Section 107(b) -- is carefully tailored to allow the Commission to take account of the circumstances of individual carriers.

Second, the Commission must give close attention to the role that cost considerations should -- and should not -- play in this proceeding. In reasonable achievability proceedings under Section 109(b), the cost of compliance for an individual carrier is relevant to whether the carrier should be required to modify its equipment, facilities, and services. But in proceedings to correct deficiencies in general industry "safe harbor" standards under Section 107(b), cost is relevant only as a basis for choosing among alternative means of meeting CALEA's assistance capability requirements -- not as a basis for excusing compliance with those requirements. To the extent that cost considerations are relevant under Section 107(b), the Commission must look to manufacturers and carriers for such information, and it should insist that any manufacturer and carrier cost estimates be adequately documented and substantiated before placing reliance on them.

Third, the Commission must resolve the general question of when call-identifying information is "reasonably available" to carriers. "Reasonable availability" is a technical concept that focuses on network design, not a financial concept involving carrier balance sheets. The J-Standard offers a proposed industry definition of "reasonably available," but the industry definition contains serious flaws that must be corrected if CALEA's provisions regarding call-identifying information are not to be undermined.

Fourth, the Commission needs to give careful consideration to how its decision in this proceeding will be implemented. The Commission has proposed to enlist the aid of an industry standard-setting body in drafting revisions to the J-Standard. We have reservations about the legal basis for such a disposition, but those reservations can be dealt with by providing that the

Commission will play a continued role following the completion of the standard-setting body's efforts. The Commission should also adopt concrete measures to ensure that proceedings before the standard-setting body move forward expeditiously and that the ultimate deadline for complying with CALEA's assistance capability requirements is not affected by any delays in those proceedings.

Turning from the general issues identified in the Notice to the specific issues surrounding the provisions of the J-Standard, we are in substantial agreement with many of the Commission's tentative conclusions. We agree with the deficiencies that the Commission has tentatively identified in the J-Standard, and we believe that those deficiencies can be (and must be) readily corrected in this proceeding. We encourage the Commission to reconsider its tentative conclusion that Section 103 of CALEA does not require the J-Standard to incorporate "surveillance integrity" features. We agree with the Commission's tentative conclusion that the J-Standard's location information provision is consistent with Section 103 of CALEA, and we stress that the location information provision entitles law enforcement to receive location information only when it has appropriate judicial authorization. Finally, with respect to packet mode communications, we do not believe that the specific packet mode provision of the J-Standard that has been challenged by CDT is deficient, and we urge the Commission to tread carefully in addressing more general packet mode issues that are beyond the immediate scope of this proceeding.

## DISCUSSION

The Department of Justice and the FBI submit the following comments in response to the Further Notice of Proposed Rulemaking released by the Commission on November 2, 1998 ("Notice"). The Notice was issued by the Commission pursuant to Section 107 of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1006, and other applicable provisions of the Communications Act of 1934. See Notice ¶¶ 23, 148.

Section 103 of CALEA requires telecommunications carriers to meet specified "assistance capability" requirements relating to the performance of authorized electronic surveillance by federal, state, and local law enforcement agencies. 47 U.S.C. § 1002. Section 107(a) of CALEA permits industry associations or standard-setting organizations to adopt "technical requirements or standards \* \* \* to meet the [assistance capability] requirements of section 103." Id. § 1006(a)(2). Section 107(b) of CALEA provides that, if a government agency or other person believes that industry technical standards adopted under Section 107(a) are deficient, it may petition the Commission to "establish, by rule, technical requirements or standards" that meet the requirements of Section 103. Id. § 1006(b).

In March 1998, the Department of Justice and the FBI ("the government") filed a petition under Section 107(b) ("Government Petition") for the Commission to issue technical standards in connection with J-STD-025 ("J-Standard"), an industry technical standard intended to implement Section 103 of CALEA for wireline, cellular, and broadband PCS telecommunications carriers. The Government Petition identified a number of specific respects in which the government believes the J-Standard to be deficient as a means of ensuring that carriers meet their assistance capability obligations under Section 103 of CALEA. The petition proposed specific additions and revisions

to the J-Standard that were intended to cure these deficiencies. The Commission also received petitions relating to the J-Standard from the Center for Democracy and Technology ("CDT") and the Telecommunications Industry Association ("TIA"). See Notice ¶¶ 16-20.

The Notice released on November 2 identifies various respects in which the Commission has tentatively concluded that the J-Standard is deficient. The Notice identifies other respects in which the Commission has tentatively concluded that the J-Standard is not deficient. The Notice requests comments on these tentative conclusions. The Notice also requests comments on a number of other matters relating to CALEA's assistance capability requirements and the Commission's performance of its responsibilities under Section 107(b) of CALEA.

These comments are submitted in response to the Commission's Notice. The comments are divided into three parts. Part I addresses general issues, both substantive and procedural, that are raised in the Notice. Part II addresses specific issues relating to the individual "punch list" items presented in the government's rulemaking petition (see Notice ¶¶ 67-128). Part III addresses the location information and packet-mode issues presented in CDT's rulemaking petition (see Notice ¶¶ 48-66).

The government has previously filed comments relating to CALEA's assistance capability requirements in response to the Commission's earlier public notice of April 20, 1998, in this proceeding. See DOJ/FBI Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed May 20, 1998) ("Government May Comments"); DOJ/FBI Reply Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed June 12, 1998) ("Government June Reply Comments"). In some instances, matters raised in the Notice have already been addressed in these prior comments. In the discussion that follows, we

refer the Commission to relevant portions of our earlier comments and incorporate them here by reference.

When the Commission considers our present comments and the corresponding comments by other parties, we urge the Commission to view them in the broad context of CALEA's underlying statutory objectives. As we have explained previously, CALEA was enacted to "insure that law enforcement can continue to conduct authorized wiretaps" in the face of rapid technological changes in the telecommunications industry. H. Rep. No. 103-827, 103d Cong., 2d Sess. 9 (1994) ("House Report"), reprinted in 1994 U.S. Code Cong. & Admin. News ("USCCAN") 3489. The outcome of this proceeding will determine whether that critical statutory goal will actually be accomplished. As Congress recognized in enacting CALEA, legally authorized electronic surveillance is a vital law enforcement tool, and law enforcement's ability to investigate, prosecute, and prevent crimes will be compromised if the deficiencies in the J-Standard are not corrected. Thus, the Commission's decisions in this proceeding will have a direct effect on the public interests in enforcing criminal laws and preserving public safety -- interests of the highest possible magnitude.

## **I. General Comments**

### **A. The Nature of the Present Proceeding**

We begin with three general comments concerning the nature of this proceeding. These comments concern the relationship between J-Standard itself and the "technical requirements or standards" that Section 107(b) requires the Commission to establish if the Commission finds the J-Standard to be deficient.

First, by virtue of Section 107(a)(2), CALEA's "safe harbor" provision, a carrier that is in compliance with the J-Standard is deemed to be in compliance with Section 103. See 47 U.S.C. § 1006(a)(2). The safe-harbor feature of Section 107(a)(2) makes the Commission's exercise of its authority under Section 107(b) critical to the intended operation of CALEA. If an industry standard such as the J-Standard is deficient -- that is, if it does not ensure that all covered carriers will in fact meet the assistance capability requirements imposed by Section 103 -- then Congress's goal of providing law enforcement with the technical capabilities needed to carry out legally authorized electronic surveillance will be directly compromised unless the standard is modified to eliminate the deficiencies. Congress has vested the Commission with the authority to establish technical requirements and standards under Section 107(b) precisely to ensure that law enforcement's ability to protect public safety and national security through lawful electronic surveillance is not frustrated in this fashion.

Second, to the extent that the Commission finally determines that the J-Standard is deficient, the sole remaining issue in this proceeding is how to correct the deficiencies, not whether to correct them. If a particular deficiency in the J-Standard may be cured by more than one means, the Commission is entitled to select from among the available means on the basis of the statutory criteria set forth in Section 107(b). But as discussed further below, the Commission may not excuse industry from correcting the deficiency altogether. See pp. 27-28 infra. If the Commission regards one proposed means of correcting a deficiency as unsuitable, it may turn to another means -- but in the end, it must designate some means of curing the deficiency and ensuring that the underlying assistance capability obligations of Section 103 will be met.

Third, carriers are not legally obligated to employ the particular means of satisfying Section 103 that are set forth in a "safe harbor" standard, regardless of whether the safe-harbor standard is set by industry or by the Commission. As we have explained previously, and as the Commission has recognized, the safe-harbor mechanism created by Section 107(a)(2) of CALEA is a voluntary one; if a carrier can satisfy its underlying assistance capability obligations under Section 103 by other means, it is free to do so. See Notice ¶¶ 7, 32; Government May Comments at 14-15; Government June Reply Comments at 13-14. Because the specific means prescribed by a safe-harbor standard are voluntary, the Commission need not pursue a "lowest common denominator" approach to standard-setting that attempts to accommodate the potentially differing circumstances of each individual carrier and each platform. Since carriers are under no obligation to use the particular means set forth in the Commission's standards, the Commission can develop standards that "meet the assistance capability requirements of section 103" (47 U.S.C. § 1006(b)(1)) without having to attempt to tailor those standards to the peculiar circumstances of individual carriers and platforms. Moreover, as discussed below, CALEA contains other mechanisms for accommodating the particular circumstances of individual carriers.

#### **B. Cost Considerations**

At a number of points in the Notice, the Commission has requested comments regarding the costs associated with the implementation of CALEA's assistance capability requirements. See, e.g., Notice ¶ 30; see also Separate Statement of Commissioner Furchtgott-Roth. To the extent that we have comments concerning the costs of particular "punch list" items, we present those comments in Part II below. However, we have several comments regarding cost considerations at a more general level.

## **1. Statutory Framework**

Congress was aware that implementing CALEA's assistance capability requirements would require telecommunications carriers to incur potentially substantial costs. Congress therefore incorporated specific provisions in CALEA addressing the issue of implementation costs. It is critical at the outset to understand the role that cost considerations do -- and do not -- play in the statutory framework of CALEA.

a. For purposes of cost, CALEA draws a basic distinction between equipment, facilities, and services installed or deployed on or before January 1, 1995, and equipment, facilities, and services installed or deployed after that date. Generally speaking, the government must bear the reasonable costs directly associated with the modifications required for pre-1/1/95 equipment, facilities, and services to meet CALEA's assistance capability requirements. See 47 U.S.C. §§ 1007(c)(3), 1008(a). A carrier is not obligated to meet the assistance capability requirements with respect to pre-1/1/95 equipment, facilities, and services unless the Attorney General has agreed to pay those costs or the equipment, facility, or service has been "replaced or significantly upgraded or otherwise undergoes major modification." *Id.* §§ 1007(c)(3)(A)-(B), 1008(d). Thus, costs associated with modifying pre-1/1/95 equipment, facilities, and services should not be of concern here.

In contrast, the costs associated with modifying post-1/1/95 equipment, facilities, and services generally must be borne by telecommunications carriers themselves. Congress understood, however, that in some instances, costs and other factors might make it infeasible for individual carriers to meet CALEA's assistance capability requirements even with respect to post-1/1/95 equipment, facilities, and services. To deal with that problem, Congress enacted Section 109(b) of CALEA, 47 U.S.C. § 1008(b).

Under Section 109(b), a carrier or other interested person may petition the Commission to determine whether compliance with CALEA's assistance capability requirements is "reasonably achievable" with respect to any "equipment, facility, or service installed or deployed after January 1, 1995." Id. § 1008(b)(1). If the Commission determines in such a proceeding that compliance is not "reasonably achievable" for a particular carrier, the Attorney General may agree, subject to the availability of appropriations, to pay the carrier for "the additional reasonable costs of making compliance with such assistance capability requirements reasonably achievable." Id. § 1008(b)(2)(A). If the Attorney General does not agree to pay such costs, the carrier is "deemed to be in compliance" with Section 103 with respect to the equipment, facilities, or services in question, and thus is excused from having to bear those costs until the equipment, facilities, or services undergo a major modification. Id. § 1008(b)(2)(B).

Congress explicitly made cost considerations part of the calculus for determining whether compliance is "reasonably achievable" under Section 109(b). In determining whether compliance is "reasonably achievable" for a particular carrier, the Commission must determine "whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems \* \* \* ." 47 U.S.C. § 1008(b)(1). The Commission also must consider "[t]he effect on the nature and cost of the equipment, facility, or service at issue" (id. § 1008(b)(1)(E)), and "[t]he financial resources of the telecommunications carrier" (id. § 1008(b)(1)(H)). These cost considerations are weighed along with a number of other factors, including "[t]he effect on public safety and national security" (id. § 1008(b)(1)(A)) and "[t]he need to achieve the capability assistance requirements of [Section 103] by cost-effective methods" (id. § 1008(b)(1)(D)), in determining whether compliance is "reasonably achievable."

b. The present proceeding is taking place not under Section 109(b), but rather under Section 107(b). See Notice ¶ 144 (dismissing, without prejudice, the portion of CDT's rulemaking petition seeking relief under Section 109(b)). Section 107(b) likewise takes account of cost considerations. It does so, however, in a different and substantially more limited fashion. The difference in treatment of cost under Section 107(b) and Section 109(b) follows directly from the different objectives of those provisions.

Section 109(b) is designed to identify circumstances in which, absent government cost reimbursement, individual carriers may be excused from compliance with CALEA's assistance capability requirements. Section 107(b), in contrast, is designed to bring carriers into compliance with CALEA's assistance capability requirements, by correcting deficiencies in industry standards that would otherwise provide a "safe harbor" under Section 107(a)(2) of CALEA. The object of proceedings under Section 107(b) is not to decide whether carriers must comply with the assistance capability requirements of Section 103, but how they are to comply.

To that end, Section 107(b) identifies a number of factors to be taken into account by the Commission in promulgating "safe harbor" standards that meet the assistance capability requirements of Section 103. See pp. 27-30 infra. Among other things, Section 107(b) directs the Commission to establish standards that "meet the assistance capability requirements of section 103 by cost-effective methods" (47 U.S.C. § 1006(b)(1)) and that "minimize the cost of such compliance on residential ratepayers" (id. § 1006(b)(3)).

In keeping with the overall purpose of Section 107(b), these provisions direct the Commission to take account of cost in determining how the assistance capability requirements are to be met, not whether they are to be met: the Commission is to look for "cost-effective means" of

"meet[ing] the assistance capability requirements" and to "minimize the cost of \* \* \* compliance" with those requirements (emphasis added). Thus, if there is more than one means of complying with CALEA's assistance capability requirements, the Commission may take account of relative costs (along with the other factors in Section 107(b)) in choosing among the alternatives. What the Commission may not do -- and what the cost provisions of Section 107(b) do not authorize the Commission to do -- is to adopt technical standards that stop short of "meet[ing] the assistance capability requirements of section 103" because of concerns about cost. Section 109(b), with its precisely articulated factors for determining whether compliance is "reasonably achievable," is the only avenue provided by Congress for the Commission to excuse carriers from compliance. Congress has made a global determination that the benefits of requiring carriers to meet Section 103's assistance capability requirements exceed the costs; Section 107(b) is not intended to invite an administrative reconsideration of that legislative cost-benefit determination.

It should be noted in this regard that Section 109(b), in contrast to Section 107(b), directs the Commission to take account of "[t]he effect on public safety and national security." See 47 U.S.C. 1008(b)(1)(A). If Section 107(b) were meant, like Section 109(b), to be a vehicle for excusing carriers from compliance with their assistance capability obligations, Congress would have included the same directive in Section 107(b), in order to ensure that the private costs of compliance are balanced against the public costs of non-compliance. Because Section 107(b) is not designed to excuse carriers from compliance with CALEA's assistance capability requirements, there was no need for Congress to direct the Commission to consider the costs to "public safety and national security" from non-compliance.

As noted above, the technical standards established by the Commission under Section 107(b) are simply a "safe harbor" for carriers that are seeking to comply with Section 103. Thus, if a particular carrier is able to comply with Section 103 by alternative means that are less costly than those entailed in the safe-harbor standard, the Commission's actions in this proceeding will not stand in its way. And if "the total cost of compliance" for an individual carrier "is wholly out of proportion to the usefulness of achieving compliance for a particular type or category of services or features" (House Report at 28, reprinted in 1994 USCCAN at 3508), the carrier may seek relief under Section 109(b).

c. In earlier stages of this proceeding, industry commenters have asserted that cost considerations are incorporated in the capability assistance requirements of Section 103 itself. Specifically, they have argued that Section 103(a)(2), which requires carriers to provide access to "reasonably available" call-identifying information, excuses carriers from providing call-identifying information if doing so would involve undue expense. In response to these suggestions, the Commission has asked commenters to address "how cost should be considered in our determination of reasonable availability." Notice ¶ 26. We address the meaning of Section 103(a)(2)'s "reasonably available" language further below, but we comment here on the relationship between "reasonable availability" and cost.<sup>1</sup>

The language and subject matter of Section 103(a)(2) indicate that "reasonable availability" is a technical concept, not a financial one. The availability of call-identifying information to a

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<sup>1</sup> As the Commission has recognized, the "reasonably available" proviso applies only to call-identifying information. There is no corresponding limitation on the obligation to deliver call content under Section 103(a)(1) of CALEA.

carrier depends on the carrier's network architecture, the network elements where the information resides, the accessibility of the information within those network elements, and other technical considerations. It is these technical considerations, not cost considerations, that should determine whether particular call-identifying information is "reasonably available."

Because Congress has explicitly incorporated cost considerations into the determination of "reasonable achievability" under Section 109(b), there is no need to also read cost considerations into "reasonable availability" under Section 103(a)(2). Section 109(b) reflects a careful appraisal by Congress of the criteria, including but not limited to cost, that should be taken into account in deciding whether to excuse a particular carrier from bearing the costs required to modify its equipment, facilities, and services to implement CALEA's assistance capability requirements. Reading cost into "reasonable availability" would be at best redundant and at worst a form of double-counting.

Moreover, reading cost considerations into "reasonable availability" under Section 103(a)(2) would create a potential obstacle to law enforcement's ability to perform legally authorized electronic surveillance that is not created by Congress's incorporation of cost factors into "reasonable achievability" under Section 109(b). If delivery of particular call-identifying information is found not to be "reasonably achievable" under Section 109(b), the Attorney General has discretionary authority under Section 109(b)(2)(A) to obtain it at public expense by reimbursing the carrier "for the additional reasonable costs of making compliance \* \* \* reasonably achievable," thereby obligating the carrier to provide access to the information (pursuant to appropriate legal authorization). 47 U.S.C. § 1008(b)(2)(A); see also id. § 1008(e)(2)(A)(i). But if particular call-identifying information is deemed to be not "reasonably available" under Section 103(a)(2), the

information is entirely outside the scope of the carrier's assistance capability obligations under Section 103. Thus, if particular call-identifying information is deemed not to be "reasonably available" under Section 103(a)(2) because of cost, the carrier would not be obligated to provide it under CALEA even if law enforcement would be willing to assume the cost of obtaining access to it.<sup>2</sup> The Commission should not -- and, in light of Section 109(b), need not -- read "reasonably available" to bring about such a result, a result that would be plainly contrary to what Congress was attempting to accomplish through CALEA.

## **2. Cost Information**

a. To the limited extent indicated above (see pp. 11-12 supra), cost considerations have a role to play under Section 107(b) of CALEA. Unfortunately, the government is severely limited in its ability to provide the kind of detailed cost information that the Commission is seeking.

The principal potential source for CALEA cost information is the telecommunications manufacturers who will provide the equipment upgrades needed to implement CALEA. Section 106(b) of CALEA (47 U.S.C. § 1005(b)) requires "manufacturer[s] of telecommunications transmission or switching equipment" to provide the carriers using their equipment with "such features or modifications as are necessary to permit such carriers to comply" with the assistance

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<sup>2</sup> It is unclear whether a carrier would be obligated by any other federal law to modify its network to provide access to call-identifying information in this circumstance. Title III provides that carriers may be ordered by a court to "furnish \* \* \* all information, facilities, and technical assistance necessary to accomplish [an] interception \* \* \* ." 18 U.S.C. § 2518(4); see United States v. New York Telephone Co., 434 U.S. 159, 177 (1977). However, "the question of whether companies have any obligation to design their systems such that they do not impede law enforcement interception has never been adjudicated." House Report at 13, reprinted in 1994 USCCAN at 3493. One of the reasons that Congress enacted the assistance capability requirements of Section 103 was to eliminate this uncertainty.

capability requirements of Section 103 and the capacity requirements established under Section 104. Section 106(b) further provides that manufacturers must provide the required modifications "on a reasonably timely basis and at a reasonable charge." *Ibid.* (emphasis added).

In connection with Section 106(b), the FBI has engaged in extensive consultations with manufacturers regarding potential CALEA solutions. However, these consultations have not involved any significant sharing of cost information by the manufacturers with the government. For obvious reasons, manufacturers regard cost data as highly confidential proprietary information, and with a single exception, they have declined to provide cost information to the FBI even on a confidential basis.

A number of manufacturers have given the FBI proposed prices, as distinct from underlying manufacturer costs, for "CALEA solutions" covering the J-Standard and the additional capabilities sought by law enforcement. However, the price proposals that the FBI has received from manufacturers have been made pursuant to non-disclosure agreements (NDAs) that prohibit the government from disclosing propriety information, including price information, without the consent of the manufacturers. The NDAs permit disclosure in limited circumstances, but none of those circumstances appears to apply here. As a result, we regretfully cannot disclose to the Commission any price information obtained from manufacturers.

b. We anticipate that carriers and other commenters will provide the Commission with their own estimates of the costs associated with implementing CALEA's assistance capability requirements. We will respond to those estimates in our reply comments. As a general matter, however, the Commission should keep the following considerations in mind when reviewing cost estimates provided by carriers.

First, the Commission should require carriers to distinguish between the total cost of meeting Section 103's assistance capability requirements and the incremental cost of implementing the "punch list" capabilities at issue in this proceeding. Carriers who choose to rely on the safe harbor created by the J-Standard must bear the costs associated with modifying post-1/1/95 equipment, facilities, and services to comply with the J-Standard, regardless of the outcome of this proceeding. The costs of implementing the J-Standard are, for present purposes, "fixed costs": industry has undertaken to incur these costs by adopting the J-Standard, and they will be incurred whether or not the Commission modifies the J-Standard to add capabilities from the government's punch list. As a result, those costs are irrelevant to the Commission's exercise of its authority under Section 107(b). To the extent that Section 107(b) provides for the Commission to take account of costs, the only relevant costs are the additional costs that may be incurred in implementing the capabilities added by the Commission.

Second, for purposes of this proceeding, carriers have an obvious incentive to maximize the claimed costs of implementing CALEA's assistance capability requirements and to minimize their professed ability to meet those requirements in a cost-effective manner. The Commission therefore must be vigilant in requiring carriers to substantiate and document their cost estimates. The Commission should ask carriers to spell out in detail the assumptions that underlie their cost estimates, such as their assumptions about anticipated price discounts. The Commission should also ask carriers to identify historical examples of software and hardware upgrades that the carriers regard as comparable in magnitude to those that may be required by the Commission here, and to identify precisely the costs attributable to such upgrades and the reasons for regarding them as comparable.

Cost estimates that are not substantiated in this manner are entitled to little weight in the Commission's deliberations.

### **C. Reasonable Availability**

As noted above, Section 103(a)(2) of CALEA obligates all telecommunications carriers to provide law enforcement agencies, pursuant to appropriate legal authority, with access to all call-identifying information that is "reasonably available to the carrier." 47 U.S.C. § 1002(a)(2). CALEA does not provide an express definition of "reasonably available" (see id. § 1001 (CALEA definitions)), and the term is not used elsewhere in the Communications Act. The Notice therefore requests comments relating to the meaning and application of "reasonably available" in Section 103(a)(2). Notice ¶¶ 25-27. We have already commented above on the relationship between "reasonable availability" and cost; we now offer the following additional comments regarding other considerations.

1. As we have explained previously, the question whether a particular kind of call-identifying information is "reasonably available" is one that does not necessarily lend itself to across-the-board, industry-wide answers. See Government June Reply Comments at 37-38. As the Commission itself has noted, the availability of particular call-identifying information "is \* \* \* likely to vary from carrier to carrier." Notice ¶ 26. Providing law enforcement agencies with access to particular call-identifying information may be technically straightforward with respect to one platform or network architecture and considerably more difficult and complex with respect to another. Thus, particular call-identifying information may prove to be "reasonably available" to one carrier and not "reasonably available" to another. Moreover, particular information that is not now

"reasonably available" may become reasonably available as telecommunications technology and network architectures change over time.

Because of the inherently platform-specific and carrier-specific nature of reasonable availability questions, it would be fruitless for the Commission to try to determine whether a particular item, such as (for example) party status information (Notice ¶¶ 80-87), is "reasonably available" to telecommunications carriers as a class. And as a practical matter, it would not be feasible for the Commission to determine the availability of particular call-identifying information separately with respect to each platform and carrier covered by the J-Standard.

Fortunately, there is no need for the Commission to make such determinations. Instead, the Commission can set forth a general definition of "reasonably available" and allow that definition to be applied by carriers and law enforcement agencies on a case-by-case basis in the future. That is the approach taken by the J-Standard itself, and there is no reason why the Commission should not follow suit in this regard.

Because the industry understood that reasonable availability may vary from platform to platform, the J-Standard does not undertake to determine whether any particular kind of call-identifying information is or is not "reasonably available." See J-STD-025, § 4.2.1 ("The specific elements of call-identifying information that are reasonably available \* \* \* may vary between different technologies and may change as technology evolves"). Instead, the J-Standard offers a general definition of "reasonably available," one that is to be applied on a case-by-case basis to each item of call-identifying information. Ibid. The items of call-identifying information listed in the J-Standard (see J-STD-025, §§ 5.4.1-5.4.10) are therefore not limited to information that the industry has determined to be "reasonably available." Instead, the J-Standard lists all items of information

that the industry deems to be call-identifying information, and relies on the industry's general definition of "reasonably available" to excuse carriers from having to deliver call-identifying information that is not reasonably available in a particular instance.

For reasons explained below, we have serious objections to the definition of "reasonably available" adopted by the J-Standard. However, we agree with industry that formulating a general definition of "reasonably available," and having the applicability of that definition to particular call-identifying information dealt with on a case-by-case basis in the future, is preferable to attempting to determine ex ante whether a particular item of call-identifying information is "reasonably available" on an industry-wide basis. The Commission therefore should address the issue of "reasonable availability" in the same general fashion as the J-Standard itself does, by framing a working definition of "reasonably available" for the parties to apply in the future. Just as the J-Standard includes all items that industry has deemed to be call-identifying information, so too should the Commission include all additional items that the Commission determines to be call-identifying information. The Commission need not determine that a particular item is "reasonably available" before adding it to the J-Standard, any more than the industry itself did with respect to the items already in the J-Standard.

2. The J-Standard provides that call-identifying information will be deemed "reasonably available" to a carrier if, but only if, "the information is [1] present at an Intercept Access Point (IAP) [2] for call processing purposes." J-STD-025, § 4.2.1 (brackets added). The J-Standard's definition of "reasonably available" further provides that network protocols "do not need to be modified solely for the purpose of passing call-identifying information." Ibid.

The government strongly disagrees with this definition of "reasonably available." If the definition is left unchanged, it has the potential to interfere significantly with Congress's goal of closing the gap between law enforcement's legal authority to conduct electronic surveillance and industry's technical capability to assist that undertaking. The definition therefore should be modified in the Commission's final Report and Order.

The J-Standard's definition of "reasonably available" suffers from two basic problems. The first involves the requirement that call-identifying information be "present at an Intercept Access Point (IAP)" and the related provision that network protocols need not be modified to facilitate the transmission of call-identifying information. The second concerns the categorical exclusion of call-identifying information that is not present at an IAP "for call processing purposes." We address these problems in turn.

a. As used in the J-Standard, "Intercept Access Point" or "IAP" refers to "a point within a telecommunications system where some of the communications or call-identifying information of an intercept subject's equipment, facilities, and services are accessed." J-STD-025, § 3. A carrier's network may (and ordinarily will) have more than one IAP. See *id.* § 4.2.2 ("The Access Function[] consist[s] of one or more Intercept Access Points"). However, the J-Standard imposes no requirements regarding where or how IAPs are to be situated within a network. Instead, it leaves the choice of IAPs entirely to the discretion of individual carriers and manufacturers. The J-Standard thus permits a carrier to situate IAPs without regard to the impact on the carrier's ability to "expeditiously isolat[e] and enabl[e] the government \* \* \* to access" call-identifying information (47 U.S.C. § 1002(a)(2)).

By permitting a carrier to situate IAPs without having to take account of the resulting effect on law enforcement's ability to carry out lawful electronic surveillance, the J-Standard's definition of "reasonably available" threatens to defeat the central purpose of the statutory scheme. A carrier may select IAPs that seriously limit, or even prevent altogether, the collection of call-identifying information that law enforcement is legally authorized to acquire. Indeed, the J-Standard explicitly contemplates that IAPs may be placed within network elements that "provide reduced [surveillance] functionality." J-STD-025, Annex A, § A.1; see also id. § 4.2.2 ("The IAPs may vary between [carriers] and may not be available on all systems"). This flies in the face of Congress's goal of "insur[ing] that law enforcement can continue to conduct authorized wiretaps," and it frustrates Congress's mandate that carriers "are required to design and build their switching and transmission systems to comply with the legislated requirements" of CALEA. House Report at 18, reprinted in 1994 USCCAN at 3498.

The problems created by this approach to the selection of IAPs are compounded by the J-Standard's unqualified position that network protocols do not have to be modified for the purpose of transmitting call-identifying information. In some instances, call-identifying information that is located elsewhere in a network could readily be made available through relatively minor modifications in network protocols.<sup>3</sup> We do not mean to suggest that carriers are obligated to modify

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<sup>3</sup> Other recent Commission proceedings have resulted in the modification of telecommunication network protocols. For example, to comply with the Commission's Local Number Portability mandate, industry has had to make modifications to the SS7 network protocol. And the Commission's E911 initiative has required modifications of IS-41, a network protocol that allows interoperability between two wireless networks. More generally, it should be noted that protocols are significantly modified and expanded on a routine basis by standards organizations each year without concerns about "breaking" either the nodes that must generate the network protocol (continued...)

network protocols in every instance where doing so would make it possible to provide law enforcement with otherwise inaccessible call-identifying information. But it is equally untenable to take the position, as the J-Standard does, that there is never any need to modify network protocols, even when the modification in question would be technically straightforward and would provide access to call-identifying information without imposing significant burdens on the network.

b. The J-Standard's requirement that call-identifying information be present at an IAP "for call processing purposes" is likewise problematic. It should be recalled that the statutory definition of "call-identifying information" (47 U.S.C. § 1001(2)) already serves to limit the scope of a carrier's obligations under Section 103(a)(2) to "dialing and signaling information that identifies the origin, direction, destination, or termination" of communications generated or received by a subscriber. To further require that such information be present at a particular point in the network "for call processing purposes," and to exclude categorically all call-identifying information that is not present at an IAP for such purposes, is to engraft a limitation on CALEA's assistance capability requirements that cannot be found in the statute itself or justified by reference to the statute's requirements. As long as call-identifying information is otherwise reasonably available, the fact that it is not present at an IAP for call processing purposes should be of no consequence.

It should be noted that requiring call-identifying information to be present at an IAP "for call processing purposes" would effectively excuse originating carriers from providing access to post-cut-through dialing, which is a particularly crucial source of call-identifying information for law enforcement. See Notice ¶¶ 123-128. The Commission has tentatively concluded -- in our view,

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<sup>3</sup>(...continued)  
messages or the signaling network that must carry them.

correctly -- that "post-cut-through digits representing all telephone numbers needed to route a call \* \* \* are call-identifying information." Id. ¶ 128; see pp. 66-70 infra. Neither the statutory definition of "call-identifying information" nor the statutory obligation to provide access to call-identifying information is tied to whether the originating carrier, as opposed to another carrier, uses the post-cut-through digits to complete the call. Yet the J-Standard's definition of "reasonably available" would effectively excuse originating carriers from providing access to post-cut-through digits -- not just in some cases, but in all cases. For reasons discussed in our earlier filings, it is not feasible for the government to look to long-distance providers or other "recipients" of post-cut-through dialing to find out the number of the party that the subject is calling. See Government June Reply Comments at 41-42 & n.24; see also pp. 68-69 infra. The J-Standard's "call processing purposes" proviso would eliminate the only practical means of obtaining this critical information reliably and expeditiously. The Commission should not construe "reasonably available" to ratify that result.

c. To deal with these problems, the J-Standard's definition of "reasonably available" needs to be modified in the following respects. First, the requirement that call-identifying information be present "for call processing purposes" should be dropped. Second, the categorical exclusion of network protocol modifications should be removed. Third, the set of IAPs employed by a carrier must reflect a reasonable effort to provide access to the call-identifying information carried by the "equipment, facilities, or services that provide [the] customer or subscriber with the ability to originate, terminate, or direct communications" (47 U.S.C. § 1002(a)). We therefore suggest that the current language in the J-Standard be replaced with the following language:

Call-identifying information is reasonably available if (1) it is present in an element in the carrier's network that is used to provide the subscriber with the ability to originate, terminate, or direct communications and (2) it can be accessed there, or can be delivered to an IAP located elsewhere, without unreasonably affecting the call processing capabilities of the network.

Construing "reasonably available" in this manner would protect a carrier's legitimate interests in the underlying integrity of its network operations and services while ensuring that law enforcement actually receives all call-identifying information that is reasonably available to the carrier.

3. In connection with the issue of "reasonable availability," the Commission has asked commenters to evaluate the types of information that have been "traditionally available under pen register and trap-and-trace authorizations \* \* \* ." Notice ¶ 27. The Notice asks for comments on "whether the provision of such information to LEAs, in light of the statutory definitions of 'pen register' and 'trap and trace device,' and judicial interpretations of them, provide guidance or represent possible factors for determining 'reasonable availability.'" Ibid.

As we have explained in earlier filings, electronic surveillance in the analog POTS (Plain Old Telephone Service) environment traditionally has been carried out by intercepting communications on the analog "local loop" between the subscriber's telephone and the central office that handles the subscriber's outgoing and incoming calls. See Government Petition at 8-9; House Report at 13-14, reprinted in 1994 USCCAN at 3493-94. Generally speaking, electronic surveillance in this setting has been performed by establishing a physical connection to the wire carrying the subscriber's calls. The signals that are carried across the local loop between the subscriber's telephone and the central office are then transmitted to a remote surveillance site where law enforcement's monitoring activities take place.

When a law enforcement agency is conducting surveillance pursuant to pen register authority (see 18 U.S.C. §§ 3121-3127), the intercepted signals are typically routed through a device called a Dialed Number Recorder (DNR). The DNR prints a record of all dialing and signaling activity transmitted across the local loop. This includes not only the digits dialed by the subject, but also signaling information such as ringing, off-hook and on-hook signals, busy signals, and the like. In short, when acting pursuant to pen register authority, law enforcement traditionally has been able to access all dialing and signaling information transmitted to and from the subscriber.

Although the underlying definition of "pen register" in 18 U.S.C. § 3127(3) speaks in terms of signaling that identifies the "numbers" transmitted over the subscriber's line, CALEA itself makes clear that law enforcement's legal authority under the pen register statute encompasses all dialing and signaling information used in call processing. Section 207(b) of CALEA amended the pen register statute to provide that law enforcement agencies "authorized to install and use a pen register" must use "reasonably available" technology that "restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing." 18 U.S.C. § 3121(c) (emphasis added). The underscored language reflects Congress's own understanding of the information that it has authorized law enforcement to obtain pursuant to pen register authority.

In response to the Commission's question, we would not go so far as to suggest that all information that has traditionally been available to law enforcement pursuant to its pen register authority is ipso facto "reasonably available." CALEA contemplates that the locus of electronic surveillance will move from the local loop to switches or other network elements under the control of the carrier. Information that has traditionally been available on the local loop may not invariably be reasonably available to the carrier when surveillance is implemented at the switch. Conversely,

some kinds of signaling information that have not traditionally been available over the local loop, such as "party hold" information (see pp. 44-47 *infra*), may now be readily available in a switch-based surveillance environment.

Nevertheless, the dialing and signaling information that traditionally has been available to law enforcement in the POTS environment does provide, in our view, a useful reference point in resolving disputes over reasonable availability. As explained in our earlier filings, Congress's underlying purpose in enacting CALEA was to "ensure that new technologies and services do not hinder [authorized] law enforcement access" to wire and electronic communications. House Report at 16, reprinted in 1994 USCCAN at 3496; see Government June Reply Comments at 10-11. Any reading of "reasonably available" that would significantly curtail access to the kinds of call-identifying information traditionally available to law enforcement is inconsistent with this legislative goal. And if a carrier contends that particular call-identifying information is not "reasonably available" to it, the fact that such information has traditionally been available to law enforcement in pen register cases should be given considerable weight in evaluating that contention.

#### **D. Section 107(b) Criteria**

As noted above, Congress has identified specific criteria to be used by the Commission in establishing "technical requirements or standards" under Section 107(b). The Commission is directed to establish standards that: " (1) meet the assistance capability requirements of section 1002 of this title by cost-effective methods; (2) protect the privacy and security of communications not authorized to be intercepted; (3) minimize the cost of such compliance on residential ratepayers; [and] (4) serve the policy of the United States to encourage the provision of new technologies and services to the public \* \* \* ." 47 U.S.C. § 1006(b)(1)-(4). In addition, the Commission must

"provide a reasonable time and conditions for compliance with and the transition to any new standard," including "defining the obligations of telecommunications carriers \* \* \* during any transition period." Id. § 1006(b)(5).

We have commented on these statutory criteria previously, and rather than repeat those comments, we incorporate them here by reference. See Government Petition at 59-63. We also address the statutory criteria in Part II below in connection with our comments about individual assistance capabilities. However, we have several additional comments about the statutory criteria at a more general level, and we present those comments here.

First, as indicated above in connection with our discussion of cost considerations (see pp.11-12 supra), the criteria set forth in Section 107(b) concern how the assistance capability requirements of Section 103 are to be met, not whether they are to be met. By its terms, Section 107(b) directs the Commission to establish technical requirements or standards that "meet the assistance capability requirements" of Section 103. 47 U.S.C. § 1006(b)(1) (emphasis added). To the extent that the assistance capability requirements can be met in more than one way, the Commission may (indeed, must) take account of the criteria in Section 107(b) in choosing among the available alternatives. But any comments that purport to invoke the statutory criteria in order to excuse carriers from meeting their assistance capability obligations have no foundation in the statute.

Second, the Commission has asked commenters to address "the extent to which the capacity requirements of section 104 [47 U.S.C. § 1003] should affect our determinations under section 107(b)." Notice ¶ 31. The Commission notes that several commenters have suggested that

"capability standards cannot be completed without first knowing the capacity that those capability standards must support." Ibid.

Those suggestions are fundamentally mistaken. Resolution of capacity issues might affect the implementation of assistance capability standards by manufacturers, but the existence of outstanding capacity issues is irrelevant to the establishment of standards by the industry and the Commission. The standards set forth in the J-Standard are generic standards that do not dictate the specific design modifications required for particular network platforms and do not depend on the capacity requirements that will be reflected in those modifications. Just as the absence of a final notice of capacity did not prevent the industry from selecting the assistance capabilities embodied in the J-Standard itself, neither should any outstanding capacity issues prevent the Commission from establishing additional assistance capabilities or delay the performance of that task.

Third, the Commission has indicated that it intends to establish a separate deadline for compliance with any "new" assistance capabilities added to the J-Standard in this proceeding, one that is later than the deadline of June 30, 2000, that the Commission has established for implementation of the "core" J-Standard requirements. Notice ¶ 133. Given the current timetable of this proceeding, the government recognizes that compliance with new provisions that are added to the J-Standard may not be feasible by June 30, 2000. We believe, however, that compliance is feasible, and should be required, no later than 18 months after the new standards are published pursuant to this proceeding.

Therefore, if the Commission directs the industry to promulgate new standards within 180 days of the Report and Order, as the Commission has proposed to do, the Commission should provide that the deadline for compliance with the new standards will be no later than 24 months after

the release of the Report and Order. Moreover, if carriers are able to implement particular capabilities in less than 24 months, they should be required to do so. To that end, the Commission should provide that the compliance deadline for each carrier will be the earlier of 24 months after release of the Report and Order or the date that the carrier has installed and deployed the modifications required to implement the capability in question. Finally, as discussed below, the Commission should also provide that the compliance deadline will not be extended in response to any delays in the industry standard-setting process.

#### **E. Implementation**

As explained above, the J-Standard must be revised to eliminate all deficiencies identified by the Commission in its Report and Order. The Notice states that the Commission intends to "permit[] Subcommittee TR45.2 of the TIA to develop the necessary [technical] specifications in accord with our determinations," rather than having the Commission itself draft specific changes to the J-Standard. Notice ¶ 132. The Notice states that TIA will be expected to "complete any such modifications \* \* \* within 180 days of release of the Report and Order in this proceeding." *Id.* ¶ 133. We have the following comments on this proposal.

1. The government understands and appreciates the Commission's desire to have the assistance of an industry standard-setting body in developing the necessary modifications to the J-Standard. However, simply turning over the task to TR45.2, without providing for any further involvement by the Commission, might expose the Commission's action to a legal challenge -- a challenge that, if successful, might require the Commission to take on precisely the drafting tasks that it understandably would prefer not to perform. As we have explained previously, when the Commission determines that industry standards are deficient, Section 107(b) of CALEA provides

for "the Commission to establish, by rule, technical requirements or standards" required to implement Section 103 of CALEA. 47 U.S.C. § 1006(b) (emphasis added). The underscored language suggests that the Commission is obligated to perform this task itself, rather than turning it over to the standard-setting body that developed the original, deficient standards. See Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996) ("when Congress has specifically vested an agency with the authority to administer a statute, [the agency] may not shift that responsibility to a private actor"); Sierra Club v. Sigler, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (agency "may not delegate its public duties to private parties"); Association of American Railroads v. Surface Transportation Board, 1998 WL 852532, at \*13 (D.C. Cir. Dec. 11, 1998) (Sentelle, J., concurring).<sup>4</sup> Thus, the Commission's Report and Order could be challenged in the courts on the ground that the Commission has engaged in an unauthorized and impermissible delegation of regulatory authority.

To minimize this risk, the Report and Order should provide that the revised J-Standard will be presented to the Commission, immediately upon its adoption, for review and (if necessary) modification by the Commission itself. The Commission should allow a strictly limited period, such as 30 days after submission of the revised J-Standard, for submission of comments (if any) regarding the revisions. The Commission should then undertake to approve or disapprove the revisions within a correspondingly expedited time, such as within 60 days thereafter.

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<sup>4</sup> The Notice states that "CALEA contemplates that standards will be developed either 'by an industry association or standard-setting organization, or by the Commission.'" Notice ¶ 132 (quoting 47 U.S.C. § 1006(a)(2)). CALEA unquestionably contemplates that standards may be developed by industry, as well as the Commission, in the first instance. But when industry has already developed standards, and the Commission has determined those standards to be deficient, the language of Section 107(b) of CALEA indicates that the ultimate responsibility for modifying the standards to eliminate the deficiencies rests with the Commission itself.

If the Commission approves the revisions, it should issue a further order establishing the revised J-Standard as a valid "safe harbor" standard. See CC Docket No. 97-213, CTIA Reply Comments at 4 (filed June 12, 1998) ("the Commission, if it deems necessary, can adopt the resulting industry consensus document by rule"). If the Commission finds the revisions deficient in any respect, it can correct the deficiencies and issue an order establishing the corrected standard as a safe harbor. By providing for the Commission to review the revised J-Standard and to issue an order establishing it (with any required corrections) as a safe harbor standard, the Commission's Report and Order would avoid being vulnerable to a legal challenge based on Section 107(b)'s requirement that the Commission "establish, by rule," the requisite technical standards.

2. The Notice proposes that TR45.2 be required to complete the necessary revisions to the J-Standard within 180 days. We agree with the Commission that 180 days is sufficient time to complete the necessary revisions. As we have noted in earlier filings, all of the capabilities in the government's punch list were originally included by industry itself in the initial working draft documents for the industry standard. See Government June Reply Comments at 15-16. Moreover, industry and law enforcement have been working together for the past year, under the aegis of TR45.2's ESS ad hoc group, to develop technical standards for implementing the punch list. As a result, the industry standard-setting process that is contemplated by the Notice is already well underway.

Nevertheless, relying on TR45.2 for assistance in the standard-setting process creates a risk of delay that could prejudice the timely implementation of CALEA's assistance capability requirements. Therefore, in addition to providing for Commission review and approval or disapproval of the revised J-Standard, the Report and Order should take additional steps to avoid

unnecessary delay and to ensure that industry's standard-setting efforts lead to a satisfactory outcome.

First, the Commission should make clear that it will require strict compliance with the proposed 180-day time limit. The Report and Order should state that the 180-day deadline will not be extended. TR45.2 should be directed to notify the Commission immediately if and when it anticipates that it will not meet the deadline. The Report and Order should further provide that if TR45.2 fails to submit the required revisions to the Commission within 180 days, the Commission will accept proposed technical standards from law enforcement as the basis for the Commission's further proceedings.

Second, the Report and Order should reiterate that TR45.2 must "complete any such modifications" within 180 days. Notice ¶ 133 (emphasis added). Before the industry standard-setting process is complete, revisions to the J-Standard will be submitted for balloting. The Commission therefore should make clear that industry must finish the balloting process within the 180-day period. If TR45.2 were merely required to put the revisions out for balloting within 180 days, the balloting process itself could be stretched out almost indefinitely -- as it was during the development of the J-Standard itself, when balloting took nearly a full year.

Third, the Report and Order should make clear that the deadline set by the Commission for industry compliance with the additional capabilities included in the Report and Order (see p. 29 supra) will not be affected by any delays in the industry standard-setting process. This will provide a further incentive for the participants to complete that process in a timely manner.

Fourth, the Commission should designate members of its staff with appropriate technical expertise to participate as observers in the industry standard-setting process, as several industry

commenters have previously suggested. The participation of Commission staff as observers will ensure that, when the revised J-Standard is submitted to the Commission, the staff is fully familiar with the course of intervening events and understands the dimensions of any remaining technical disputes.

Finally, the Report and Order should be as precise as possible in describing the capabilities that are to be added (and any other changes that are to be made) to the J-Standard. If the Report and Order are precise, the process of giving technical form to the Commission's decision should be relatively straightforward. But if the Report and Order are vague or ambiguous about the scope of the required changes, the result is likely to be disagreement among the parties and protracted delay. Insofar as the Commission ultimately agrees with the government regarding the current deficiencies in the J-Standard, we encourage the Commission to refer to Appendix 1 of the Government Petition for a precise description of the capabilities that should be added to correct those deficiencies.

#### **F. Other General Issues**

1. As the Commission has noted, the J-Standard applies to wireline, cellular, and broadband PCS carriers, the telecommunications carriers whose compliance with CALEA's assistance capability requirements is of most immediate concern to law enforcement. See Notice ¶ 134. The Commission has asked for comments regarding "what role, if any, the Commission can or should play in assisting those telecommunications carriers not covered by J-STD-025 to set standards for, or to achieve compliance with, CALEA's requirements." *Id.* ¶ 141. The Commission seeks comments on how its determinations in this proceeding will affect the standards adopted by other industry segments and on whether the Commission "should consider the impact of the technical requirements we ultimately adopt in this proceeding on these other technologies and services." *Ibid.*

The Commission's determinations in this proceeding regarding CALEA's assistance capability requirements will have a direct and, in our view, beneficial effect on voluntary efforts by other industry segments to establish "safe harbor" standards under Section 107(a) of CALEA. Other industry groups have looked to the J-Standard in formulating their own CALEA safe harbor standards,<sup>5</sup> and they undoubtedly will pay equal attention to the Commission's modifications to the J-Standard. A determination by the Commission that Section 103 imposes a particular assistance capability should guide all telecommunications carriers. As a result, carriers who are not covered by the J-Standard can, and undoubtedly will, seek guidance from the Commission's Report and Order here in developing their own technical standards. We do not believe that the Commission needs to take any more direct action to foster the development of other industry standards; the standard-setting process will work best if the participants are allowed to go forward with the guidance provided by the Commission's decision in this proceeding.

2. The Notice incorporates an Initial Regulatory Flexibility Analysis (IFRA) required by the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq. See Notice ¶¶ 148-164. Among other things, the IFRA includes a description of projected reporting, record-keeping, and other compliance requirements. Id. ¶¶ 161-162; see 5 U.S.C. § 603(b)(4).

The Commission's discussion of reporting and record-keeping requirements notes that the Commission has previously proposed requiring telecommunications carriers to establish policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity. Notice ¶ 161; see Notice of Proposed Rulemaking, In the Matter of Communications

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<sup>5</sup> For example, PCIA has published CALEA standards for one-way and two-way paging, and in the course of drafting those standards, PCIA looked to the J-Standard for guidance.

Assistance for Law Enforcement Act, CC Docket No. 97-213, ¶¶ 30-33 (released Oct. 10, 1997).

The Commission tentatively concludes that "a substantial number of telecommunications carriers \* \* \* already have in place practices for proper employee conduct and recordkeeping." Notice ¶ 161.

The Commission further tentatively concludes that "the additional cost to most telecommunications carriers for conforming to the Commission regulations contained in this Further NPRM should be minimal." Ibid. The Commission has requested comments on these tentative conclusions.

The Commission is correct that a substantial number of telecommunications carriers already have in place practices and procedures for employee conduct and recordkeeping relating to authorized electronic surveillance. The extent to which existing practices and procedures are adequate to meet CALEA's systems security and integrity (SSI) requirements (see 47 U.S.C. §§ 229(b), 1004) is a separate issue that should be addressed in the context of the Commission's ongoing review of SSI issues. As for the additional reporting and recordkeeping costs that will be incurred by carriers as a result of the Commission's actions in this proceeding under Section 107(b), we agree with the Commission that those costs should be minimal.

## **II. Comments Regarding the Government "Punch List" Capabilities**

The government's rulemaking petition identifies a number of specific respects in which the government believes the J-Standard to be deficient as a means of ensuring that carriers meet their assistance capability obligations under Section 103 of CALEA. See Government Petition at 24-58. The government has proposed additions and alterations to the J-Standard that are intended to eliminate these deficiencies. The government's proposed changes to the J-Standard have come to be referred to collectively as the "punch list."

The Commission has tentatively concluded that a number of the specific capabilities included in the punch list are required by Section 103 of CALEA. The Commission also has tentatively concluded that certain capabilities included in the punch list are not required by Section 103. The Commission has asked for comments on these tentative conclusions. The Commission also has asked for comments on a number of specific questions relating to the individual punch list items.

The following comments are submitted in response to these requests. The comments are presented in the order that the punch list capabilities are addressed in the Notice.

**A. Conference Call Content**

1. The J-Standard limits the ability of law enforcement to intercept the communications of parties to a conference call supported by the subscriber's equipment, facilities, or services. Under the J-Standard, law enforcement is provided with only those communications that are occurring over the legs of the call to which the subscriber's terminal equipment is actually connected (and hence audible to the intercept subject) at any point in time. See J-STD-025 § 4.5.1. As a result, if other parties to the conference call speak to each other when the subject places them on hold or drops off the call, the J-Standard does not provide access to those communications.

The Commission has tentatively concluded that Section 103(a)(1) of CALEA requires carriers to provide law enforcement with access to all content of subject-initiated conference calls supported by the subscriber's equipment, facilities, and services. Notice ¶¶ 77-78. We agree with that tentative conclusion. Section 103(a)(1) expressly provides that a carrier must provide access to "all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber." 47 U.S.C. § 1002(a)(1) (emphasis added). For reasons set forth in our earlier filings, this statutory obligation includes communications between

parties on all legs of conference calls carried "to or from" the subscriber's "equipment, facilities, or services." See Government Petition at 32-33; Government June Reply Comments at 17-21. And as we have explained earlier, the failure to provide law enforcement with access to all legs of conference calls could result in the loss of important information that law enforcement agencies are entitled to obtain under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") and other applicable laws. See Government Petition at 31-32. We refer the Commission to the cited portions of our earlier filings for a more complete discussion of these points.

2. Section 103(a)(1) applies to communications carried by a carrier to or from the "equipment, facilities, or services of a subscriber." 47 U.S.C. § 1002(a)(1). The Notice requests comments on how the Commission should "define or interpret \* \* \* the phrase 'equipment, facilities, or services' in the context of subscriber-initiated conference calls." Notice ¶ 77.

The government has addressed the scope of this language in its earlier filings in this proceeding. See Government June Reply Comments at 17-20. As we have explained, a subscriber's "services" encompasses all services provided to the subscriber by the carrier, including conference calling services and other multi-party calling services. A subscriber's "equipment" and "facilities" encompass all of the elements of the carrier's network that support and are identifiable with the services that the carrier provides to the subscriber. Thus, if a carrier provides a subscriber with a conference calling service that has the capability to support communications between "held" legs of conference calls, the equipment and facilities used to provide that service are part of the subscriber's "equipment" and "facilities" for purposes of Section 103(a)(1), and communications between held legs of a conference call are carried "to or from the equipment, facilities, or services" of the subscriber. If the held legs remain "up" when the subject places them on hold or drops off the call,

it is because the subscriber's services include that capability, and the network elements used to maintain the connection between the held legs remain part of the subscriber's equipment and facilities for the duration of the call.

3. The Commission has tentatively concluded that a carrier is not obligated to provide law enforcement with access to conversations between other parties to a conference call when "the call is either disconnected or rerouted" after the subject drops off "and the 'equipment, facilities, or services of a subscriber' are no longer used to maintain the conference call \* \* \* ." Notice ¶ 78. If the call is actually "disconnected" when the subject drops off, the other legs of the call are broken down and no further communications between the other parties can take place, meaning that there is no further call content to deliver. If the call is not disconnected but is "rerouted" -- that is, if the carrier's network changes the path of the remaining call legs so that the communications no longer traverse the network element that originally handled the conference call -- the carrier's obligations depend on whether the call continues to use the "equipment, facilities, or services" of the subscriber. If "the 'equipment, facilities, or services of [the] subscriber' are no longer used to maintain the conference call" (Notice ¶ 78), then as the Commission has tentatively concluded, the carrier has no obligation under Section 103(a)(1) to provide access to the subsequent communications. But if the subscriber's equipment, facilities, or services are still used to maintain the conference call when the subject drops off and the call is rerouted -- as will ordinarily be the case -- then the carrier's obligation under Section 103(a)(1) is unchanged. The use of the subscriber's equipment, facilities, or services remains the statutory touchstone.

4. Section 103(a)(1) provides that a carrier must give law enforcement access to "all wire and electronic communications carried by the carrier within a service area to or from equipment,

facilities, or services of a subscriber." 47 U.S.C. § 1002(a)(1) (emphasis added); see also id. § 1002(d) (defining assistance obligations of mobile service provider that "no longer has access to the content of [a subscriber's] communications or call-identifying information within the service area in which interception has been occurring" because the call has been handed off to "to another service area or another service provider"). The Commission notes that, in some cases where a conference call is rerouted, the call may no longer be carried within the same "service area" that originally handled the call, but instead may be routed through a different service area. Notice ¶ 78. The Commission has tentatively concluded that Section 103(a)(1) does not obligate a carrier to provide access to the contents of the conference call in this circumstance. Ibid.

The government disagrees with this tentative conclusion. Section 103(a)(1)'s reference to communications "carried \* \* \* within a service area" simply means that, at any one time, a carrier's assistance delivery obligations focus on a prescribed service area. It does not follow that a carrier's obligations under Section 103(a)(1) are limited to the same service area over the life of a call. When a carrier that has multiple service areas reroutes an ongoing communication from one service area to another one served by the same carrier (as often happens in the case of mobile wireless communications), the carrier's assistance obligations under Section 103(a)(1) do not terminate; instead, they simply shift to the new service area. Thus, assuming that a carrier is otherwise obligated to provide access to held legs of a conference call under Section 103(a)(1), the rerouting of the conference call through another service area does not excuse the carrier from providing access to the call. The carrier either must continue to route the conference call through the original IAP or

must ensure that law enforcement is able to access the conference call without loss of call content through another IAP.<sup>6</sup>

5. The Commission has tentatively concluded that a carrier's obligations under Section 103(a)(1) do not extend to "conversations between a participant of the conference call other than the subject and any person with whom the participant speaks on an alternative line \* \* \* ." Notice ¶ 78. For example, "when A, the subject, is on a conference call with B and C, we tentatively conclude that [access to] C's conversation with D on call waiting is beyond CALEA's requirements." Ibid.

As a general matter, the government agrees with this tentative conclusion. When (to use the Commission's example) C uses his own call waiting service to speak to D rather than to A and B, the conversation between C and D ordinarily is not carried to or from A's "equipment, facilities, or services," and therefore is not within the scope of the carrier's obligations under Section 103(a)(1) (unless, of course, law enforcement has separate legal authority to intercept communications to and from C's facilities). But if C has the capability of joining D to the conference call, so that communications between C and D are transmitted to A during the course of the conference call, then those communications would be "carried to or from" A's equipment, facilities, or services and would be within the scope of the carrier's obligations under Section 103(a)(1) in that situation.

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<sup>6</sup> If the rerouting of the call involves not simply a different service area but another carrier, so that the original carrier is no longer involved in transmitting the call, then the original carrier has no further obligation under Section 103(a)(1) to provide access to the contents of the call. Cf. House Report at 22, reprinted in 1994 USCCAN at 3502 ("if an advanced intelligent network directs the communication to a different carrier, the subscriber's carrier only has the responsibility, under subsection (d) [of Section 103], to ensure that law enforcement can identify the new service provider handling the communication").